Opinion prepared by Dr Vaughan Lowe of Corpus Christi, Cambridge, in consultation with Susan Marks amd Robert McCorquodale, also of Cambridge University, at the request of Lord Avebury, Parliamentarians for East Timor.

Australia-Indonesia Timor Gap Zone of Cooperation Treaty

Introduction

In 1975 Indonesia invaded East Timor in flagrant violation of international law. The Timor Gap Zone of Cooperation Treaty is an attempt by Indonesia to reap the fruits of that violation. There are, moreover, compelling arguments that, in concluding the Treaty, both Australia and Indonesia are acting inconsistently with fundamental principles of international law, and that the Treaty is invalid. The principal arguments are as follows:

1. No Title

The Treaty is invalid on the ground that Indonesia lacks legal title to the area containing the resources dealt with in the Treaty. It is a fundamental principle of international law that an unlawful use of force cannot confer title to territory. This principle derives from the prohibition on the use of force, laid down in the United Nations Charter and elsewhere. Indonesia's seizure of East Timor in 1975 was clearly an unlawful use of force, and has been regarded as such by the UN Security Council and General Assembly.

In some circumstances it is possible for title to territory to be acquired, even though the initial act of occupying the territory was unlawful. Where there is evidence of effective and peaceful control of the territory over a substantial period of time, and where the claimant's sovereignty has been widely recognised by other states, particularly other interested states, the initial defects in the claimant's title may be regarded as having been 'cured'. However, this process cannot assist Indonesia's claim with regard to East Timor.

Few states have recognised Indonesian title to East Timor *de jure*. Even if more states had recognised its title, it is highly controversial whether a title which derives from an unlawful use of force can be validated in the way described. This is because, under contemporary international law, there is a further fundamental principle that prohibits states from recognising as legal any territorial acquisition resulting from a use of force. The principle was reaffirmed in 1970 in a major General Assembly resolution, the Declaration on Principles of International concerning Friendly Relations and Cooperation amongst States, adopted with the consent of all Members of the United Nations, including Australia. The Australian statement that "there is no binding obligation not to

CDP DOCUMENT TL1405

recognise the acquisition of territory acquired by force" is incompatible with this authoritative statement of international law.

2. Violation of Right of Self-Determination

The Treaty is also unlawful because it violates the right of self-determination of the East Timorese people under international law. Before the Indonesian invasion, the East Timorese were a people under Portuguese colonial rule. They therefore had a right to self-determination. The invasion was plainly a violation of that right. Indonesia has claimed that the East Timorese people freely agreed to become part of Indonesia by means of a vote taken in the People's Assembly of East Timor shortly after the invasion in 1976. It is widely asserted that this vote was not a genuine expression of the wishes of the East Timorese people. If this assertion is correct, the incorporation of East Timor into Indonesia was a further violation of the East Timorese people's right of self-determination.

In being violated, the right of self-determination was clearly not lost. That it subsisted and continues to subsist is highlighted by the fact that Portugal, the UN General Assembly and the UN Special Committee on Decolonisation all continue to regard East Timor as a non-self-governing territory that has yet to realise self-determination.

The Treaty constitutes a further violation of the East Timorese people's right of self-determination, not only on the part of Indonesia, but also on the part of Australia. So far as Indonesia is concerned, the Treaty would be a reiteration of that state's unwarranted assertion of sovereignty over East Timor, inconsistent with the East Timorese people's rights. So far as Australia is concerned, the Treaty would arguably place it in breach of the duty not to impede the realisation of self-determination, which is a corollary of the right of self-determination itself.

The implications of the Treaty for the East Timorese people's right of self-determination in fact extend even further than Indonesia and Australia. Under the UN Charter the task of assisting non-self-governing peoples to achieve self-government is described as a "sacred trust". This sacred trust is vested immediately in Portugal, the colonial power, but also, at a 'deeper' level, in the United Nations as a whole. Again, this is reflected in the maintenance of East Timor on the General Assembly's and Decolonisation Committee's agenda and in the efforts of the Secretary-General to secure respect for the rights of the East

Timorese people. The Treaty is not, therefore, a purely bilateral matter between Australia and Indonesia.

3. Conflict with Peremptory Norms

The Treaty is also invalid because it conflicts with a so-called peremptory norm, or possibly several peremptory norms, of international law. The Vienna Convention on the Law of Treaties provides that a treaty is void if it conflicts with a peremptory norm of international law (i.e., a norm from which no derogation is permitted and which can only be altered by a subsequent norm of international law having the same character). Although Indonesia is not a party to the Vienna Convention, the Convention is widely regarded as reflecting general international law.

There is general agreement that the prohibition on the use of force is a peremptory norm. In providing a means by which Indonesia will reap the benefits of an unlawful use of force, the Treaty undermines, and hence conflicts with, the prohibition on the use of force and is therefore void.

The Treaty conflicts more directly with the other rules of international law mentioned above: the duty of states not to recognise as legal territorial acquisitions resulting from an unlawful use of force and the right of peoples to self-determination. Arguably, the duty of non-recognition is simply a corollary of the prohibition on the use of force and is a peremptory norm on that basis. There is a substantial body of opinion in support of the proposition that, in view of its fundamental importance to the international community as a whole, the right of self-determination is also a peremptory norm. If these rules are indeed peremptory norms, they provide further grounds for the invalidity of the Treaty.

4. Other arguments

Further arguments could be advanced against the lawfulness of the Treaty. For example, it may be that Indonesia is properly to be regarded as a belligerent occupant of East Timor (as Israel is regarded as a belligerent occupant of the West Bank). If this is the case, the Treaty plainly goes beyond Indonesia's entitlement to deal with East Timor's resources.

Alternatively, the Treaty could be unlawful because it is an attempt to usurp the East Timorese people's right of permanent sovereignty over the natural resources of East Timor. The right of

peoples and nations to permanent sovereignty over their natural resources was confirmed in 1962 in a widely-supported Resolution of the General Assembly, which has since been accepted as indicative of general international law.

How should these issues be determined?

While there may be answers to some of the points made above, the cumulative weight of the various arguments is such that there must be the gravest doubt whether Australia and Indonesia would be acting consistently with international law in entering into the Treaty. Sadly, those who stand to lose by the Treaty are in no position to have their case properly determined.

There is no possibility of the East Timorese bringing the matter before an international tribunal at present. They lack legal standing to do so. They could perhaps bring action in the future against Australia, Indonesia, or perhaps even individual companies involved in petroleum exploration in the Treaty area, if East Timor eventually achieves independence.

Portugal could possibly take action on behalf of the East Timorese, and indeed should do so, in order to preserve its own rights and fulfill its duties towards East Timor. It might be able to refer the matter to the International Court of Justice. However, Indonesia has not accepted the jurisdiction of the Court, and is unlikely to cooperate in referring the case to it. The UN could request the International Court to give an Advisory Opinion, but is unlikely to do so unless prompted by one or more of the states concerned.

Conclusion

There are serious grounds for believing that the Treaty is invalidated by Indonesia's actions in East Timor in 1975 and that it represents a violation of international law vis-a-vis the East Timorese people. If the East Timorese people are unable to demonstrate this in any international forum, their inability to do so has more to do with their procedural incompetence than with any intrinsic demerits of their arguments. International law should not fail in a case like this. The parties to the Treaty should themselves be prepared to have the validity and lawfulness of the Treaty tested and determined by an appropriate international body. They should do this **before** the Treaty is ratified and brought into effect.